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No. 711

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

FORSTER MFG. CO., INC., *a Corporation,*

and

THEODORE R. HODGKINS, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners, Forster Mfg. Co., and Theodore R. Hodgkins, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above case on May 24, 1966.

Opinions Below

The Opinion of the Circuit Court of Appeals is printed in Appendix A hereto and is reported in 361 F.2d 340. The opinion is described as "but a supplement" (R. 553) to the Opinion of the Circuit Court of Appeals (R. 469-483) reported in 335 F.2d 47; cert. denied 380 U.S. 906. The Initial Decision of the Federal Trade Commission's Hearing Examiner is printed in the record in the court below, nine copies of which have been filed with this Petition, at

R. 340-382. The Opinion of the Federal Trade Commission is not officially reported and is printed in the Record at 391-441. The Opinion of the Federal Trade Commission on Remand is not officially reported and is printed at R. 495-530.

Jurisdiction

The judgment of the First Circuit Court of Appeals was entered on May 24, 1966. (R. 555). A Final Decree Affirming And Enforcing Order To Cease And Desist was entered on June 14, 1966. (R. 556-557). An Order Extending Time To File Petition For Writ Of Certiorari to and including October 21, 1966, was entered on August 18, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

Question Presented

Whether an opinion and findings by two of five FTC Commissioners constitutes a Decision of the Commission and a valid basis for a Cease And Desist Order.

Statutes Involved

The statutory provisions involved are Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 48 Stat. 1526, 15 U.S.C. Sec. 13(a), (b), Appendix B, page 16, infra; the Federal Trade Commission Act, Section 1, 15 U.S.C. sec. 41, page 15, infra; and the Administrative Procedure Act, Section 8(b), 5 U.S.C. sec. 1007(b), page 15, infra.

Statement of the Case

Two members of the Federal Trade Commission, out of the five provided by statute, found against Petitioners on closely contested issues and entered a Cease And Desist

Order which a dissenting Commissioner called "throwing the book" at Petitioners.* (R. 391-441, 441).

Petitioner was found guilty of having a predatory or destructive intent because its chief competitor in the sale of certain skewers went out of business. (R. 397-401). Petitioner's defense included the fact that the competitor company was not diversified, had had no sales organization, had been selling 80% of its production to Petitioner (R. 5) after a fire in Petitioner's plant which outlet decreased when Petitioner resumed production, and was managed by a 28-year-old novice, working after hours while filling a full-time job some 35 miles from the skewer factory. (R. 397, 398, 404). Despite overwhelming evidence in support of this defense the two-man FTC brushed it aside. This initial finding of "predatory intent" was then carried over and weighed in support of the second and third charges and they too were found adverse to Petitioner.

A second charge was that Petitioner gave one set of clothespins free to purchasers in the Pittsburgh area to meet a competitor's similar offer. Without questioning the fact that the competition had done so, or recognizing the necessity of meeting this competitive action, the two-man Commission held against Petitioner. (R. 414-416).

A third charge was that Petitioner sold ice cream spoons, including sales in the Washington area, at discriminatory prices. The two-man FTC refused to consider uncontradicted evidence admitted over the objections of the Commission counsel as to market conditions necessitating the prices and, on the sole basis of testimony which the Hearing Examiner agreed to strike from the record, found Petitioner guilty of predatory intent.

On appeal, the First Circuit Court of Appeals shocked at the order and deficiencies in the findings of the two

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* Petitioners hereinafter referred to jointly in the singular.

members of the Commission sent the case back for further proceedings (1) in regard to the defense that Petitioner reduced prices in connection with skewers and clothespins "to meet the equally low price of a competitor" and (2) for modification of the Cease and Desist Order. (R. 469-483). A Petition for Certiorari to this Court was opposed by the Solicitor General on the ground that the Petition was premature until after the Commission acted on the remand. The Petition was denied. 380 U.S. 906.

The full Commission, without reopening the record to receive additional evidence, and standing on and merely supplementing the two-member FTC finding of a violation of the Act, found against the Petitioner on the remanded issue of good faith meeting of competition. The FTC did modify its initial Cease And Desist Order. The new Order prohibits Petitioner from selling its products at any price below that of any smaller competitor, regardless of whether it is aware of the competitor's size or price. (R. 531).

The First Circuit Court of Appeals in its supplementary opinion affirmed the Commission though agreeing with the Petitioner that the Order "leaves something to be desired," and chiding Commission counsel for excessive and wrongful characterization of the evidence.

Reasons for Granting the Writ

1. *Opinion and Findings by Two of Five Member Commission Is Not a Decision*

Congress has provided that one charged by and brought before the five-member Federal Trade Commission has the protection that at least three out of the five members must vote to uphold the Commission's charges in order for the vote to constitute a "decision" against a respondent. See Federal Trade Commission Act, Section 1, 15 U.S.C. sec. 41. Congress delegated powers to a five-member Commission as such and not to any smaller group of Commissioners

(except when there is a vacancy). 15 U.S.C. sec. 41.

The Court of Appeals For the Ninth Circuit has said that "... an order of the Commission must be supported by three members in order to constitute an enforceable order of the FTC. Two of five is too few." *Flotill Products, Inc.* v. *F.T.C.*, 358 F.2d 224, 230 (9th Cir. 1966), aff'd. per curiam, *en banc* August 15, 1966, 1966 Trade Cases ¶ 71,871, petition for cert. filed Oct. 12, 1966, No. 668. It added that it was "... difficult to believe that Congress conceived of the five-member FTC with its politically balanced make-up permitting two of its members to speak for the Commission, and failed to specifically provide enabling legislation." Id. at 229, as amended. The First Circuit Court of Appeals in the instant case disagreed with the Ninth Circuit's decision.

Here the due process protection provided by the law was not allowed Petitioner. The danger of such a two-man finding in such a proceeding before those who formulate the original charges is amply demonstrated by this case. Substantial countervailing evidence was submitted by Petitioner justifying its prices as a good faith effort to meet equally low prices of competitors. This evidence was summarily rejected by the two-man Commission (both of whom were former FTC prosecuting attorneys expert in formulating findings against FTC respondents). The weighing of the evidence which this Court has held to be a basic due process requirement did not take place. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488. What occurred was that with the one-sided zeal of the prosecutor these two former FTC prosecutors upheld their own charges against Petitioners by the simple expedient of ignoring Petitioners' countervailing evidence.

Where Congress has given an administrative agency the power to act with the concurrence of less than a majority of its members, this power has always been explicitly stated. See National Labor Relations Board, 29 U.S.C. sec. 153(b);

Interstate Commerce Commission, 49 U.S.C. sec. 17. No provision similar to these appears in the Federal Trade Commission Act, hence it must be concluded that Congress did not authorize the Federal Trade Commission to act without the approval of a majority of its members. It is well settled that in construing statutes, words omitted by Congress may not be added. *62 Cases of Jam* v. *U.S.*, 340 U.S. 593, 596.

In addition, the Commission has not complied with Section 8(b) of the Administrative Procedure Act, 5 U.S.C. sec. 1007(b). The order is not supported by findings of fact and conclusions of law upon which a majority of the Commission have agreed. See *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 94; cf *I.C.C.* v. *New York, N.H. and H.R.*, 372 U.S. 744, 751, n8.

2. *Appeals Did Not Correct the Jurisdictional Defect of No Decision as the Court Refrained From Considering the Evidence.*

On appeal, the First Circuit Court of Appeals remanded the case to the Commission for further proceedings in regard to the defense that Petitioner was discriminating "to meet the equally low price of a competitor" and for modification of the Cease and Desist Order. (R. 469-483). The jurisdictional question was not considered.

On remand, the Federal Trade Commission, without considering the jurisdictional question or calling for new evidence, or even reconsidering the evidence, merely built upon and supplemented the two-man Commission's findings and redid the harsh Order to get Commissioner Elman's vote. As stated, the Commission only dealt with (1) "The principal issue remanded to us by the Court involved the question of 'meeting competition' under Section 2(b)" (R. 496) and (2) "The Court has also directed us to clarify and perhaps modify the order to cease and desist." (R. 516)

The Commission emphasized "It is thus settled that respondents have violated the statute in the discriminatory sales of two different products involving four different customers." (R. 496) The "settled" conclusion is based upon the two-member findings, which could not settle or decide anything. Accordingly, the vote for the current order did not correct the initial jurisdictional defect.

The Opinion of the First Circuit describes the Commission action; "On remand the Commission reaffirmed its findings as to the two charges but both clarified and modified its order." (R. 551) The Circuit Court refused to consider the jurisdictional question here presented.

As this Court stated in *U.S.* v. *Corrick*, 298 U.S. 435, 440:

> "The appellants did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined *sua sponte*, to proceed in the cause. And if the record discloses that the lower court was without jurisdiction, this court will notice the defect, although the parties make no contention concerning it. While the District Court lacked jurisdiction we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit."

This Court has always held that a vote of less than a majority of this Court is not a vote of the Court and not a decision of the Court. *Alaska* v. *Troy*, 258 U. S. 101, 111. Obviously, the same rule applies to the Federal Trade Commission in performing its adjudicatory function. The need for such a rule is clearly evident in Robinson-Patman Act cases in which the Commission is forced to draw a fine line

between a company simply being aggressively competitive and one that violates the law. Here the need for protection is vividly portrayed. Petitioner should not be subjected to the sweeping effects of the Commission's Cease and Desist Order bottomed on the illegal findings of a two-man Commission. The Circuit Court, contrary to its reluctant decision, is not bound by the findings of two members of the Commission.

A crucial point here is that the two commissioners in order to find against Petitioner had to go to the extraordinary decision of establishing an entirely new and erroneous standard of proof as to primary line competitors. As Commissioner Elman said in his dissent to the original order, this is a classic case of two commissioners deciding that Petitioners are bad people, so these commissioners came up with a new scheme in order to "throw the book" at these "bad" respondents. This Court has held in many cases that even the most odorous, or "bad" people are entitled to full due process of law and all statutory protections provided by the Congress. Petitioner did not receive these here. They would not bring this Petition here but for their firm conviction that upon reversal Petitioner can convince a three-member majority of the Commission that they are honest—good faith—business competitors, not statutory violators.

3. *There Is a Conflict in Recent Decisions of the Circuit Courts of Appeals on Whether a Two-Man Vote Is a Decision, F.T.C. Is Also Asking Review.*

The question presented, though with distinguishable fact situations, has been the subject of conflicting decisions in the Circuit Courts. Compare *Flotill Products, Inc.* v. *F.T.C.*, 358 F.2d 224 (9th Cir. 1966), aff'd per curiam, *en banc* August 15, 1966, 1966 Trade Cases ¶ 71,871, petition for cert. filed Oct. 12, 1966, No. 668; *Lapeyre* v.

F.T.C., decided by the Fifth Circuit on September 13, 1966, 1966 Trade Cases ¶ 71,881; and *Atlantic Refining Company* v. *F.T.C.*, 344 F.2d 599 (6th Cir., 1965). The question is pending before the Third Circuit in *Luria Bros. & Co.* v. *F.T.C.* (No. 14,402).

As recently as September 23, 1966, the Federal Trade Commission in the case of *National Dairy Co.* v. *F.T.C.*, Docket No. 7018, 1966 Trade Cases ¶ 17,704 reasserted its claim to statutory power to decide by two votes. The FTC said that even though the *Flotill* decision was issued by the court several months before the present decision, the decision in *Flotill* does not stand as the ultimate determination on the issue. On October 12, 1966, the Solicitor General, on behalf of the Federal Trade Commission, petitioned for a writ of certiorari to review the *Flotill* decision and raised the important question presented in this case. It is respectfully urged that a Writ of Certiorari should be granted to settle this conflict.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 6625

FORSTER MFG. CO., INC., et al., *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

ON PETITION FOR REVIEW OF ORDER ON REMAND OF FEDERAL TRADE COMMISSION

OPINION OF THE COURT

May 24, 1966

Aldrich, *Chief Judge*. This petition to review an order of the Federal Trade Commission was previously before us under the same name, and is reported, 1964, 335 F.2d 47. Originally involved were several charges of price discrimination in violation of section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), in the sales of various woodenware products. We set aside the order because of the incorrectness of the Commission's reasoning and the resulting burden which it placed upon petitioner [1] in respect to two of the charges, hereinafter the "two charges." 335 F. 2d at 55-56. We voiced no criticism as to what we will refer to hereafter as the "other charges." We also agreed with the petitioner that in any event the Commission's order was less than clear, and we added that in addition to clarifying it the Commission might consider other modifications. We did not define what these were, but the area of dispute was already apparent from the dissenting opinion of Commissioner Elman.

Unsatisfied with the scope of its success, petitioner sought certiorari. The Commission opposed. By a "memorandum"

[1] The petition was filed by Forster Mfg. Co., Inc., and T. R. Hodgkins, its president. We will refer to them jointly in the singular.

it represented that the petition was "premature" because if, as a result of our remand, the findings as to the two charges were reversed that "would probably upset . . . . [another] finding . . . . might also undermine . . . . [another] determination . . . [and] may induce it to re-examine the entire proceeding . . ." Certiorari was denied, 380 U.S. 906.

On remand the Commission reaffirmed its findings as to the two charges, but both clarified and modified its order. Commissioner Elman filed a concurring opinion. Commissioner MacIntyre "non-concurred" because the new order was insufficiently broad. In its petition for review petitioner now seeks to set aside not only the findings as to the two charges, but as to the other charges as well.[2] The Commission's response with respect to the other charges is that they are not now open. In view of the fact that the Commission reaffirmed its findings, and we agree with the reaffirmance, the uncertainty which remained at the time certiorari was sought has evaporated. Insofar as review in this court is now concerned, the other charges are not open. Indeed, this would be so even if we disagreed with the Commission's reaffirmance. The broader reconsideration which the Commission stated to the Supreme Court this might call for was to be by the Commission on remand, not by us. Again, see fn. 2, petitioner is arguing matters which we cannot consider.

With regard to the two charges, we accept the Commission's findings as to petitioner's improper conduct. Petitioner feels, if we may characterize its contentions, that the Commission's new opinion merely demonstrates that, "He that complies against his will is of his own opinion still."[3] However, we do not think petitioner's present criticisms take the case beyond the rule that the Commission's conclusions must be upheld, where adequately sup-

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[2] It also seeks reconsideration of a completely unrelated matter, alleged deficiencies in the complaint and the Commission's refusal to remedy by furnishing particulars. This was elaborately reviewed in our original opinion, and a petition for rehearing was denied. For petitioner to seek further consideration, as it does at length, is singularly impermissible.

[3] Samuel Butler, Hudibras.

ported, even though we might not agree with all of its reasoning.

We confess that we do not reach this decision without initial difficulty. It is charged in the Commission's brief that the petitioner's argument "is permeated with erroneous assertions of fact." None of these assertions is initially identified, beyond a blanket reference to nine pages in petitioner's brief, but the Commission's brief promises it will deal with "several" of them. Later, this blanket condemnation is repeated, but the promise is not kept. Only one alleged misstatement is ever specified. We highly disapprove of blackening an opponent by general accusations that one fails to support. It is particularly inappropriate for this to be done by an agency of the government.

Even as to the identified misstatement, petitioner's argument seems entirely proper, and the reconciliation it suggests of the evidence is at least as plausible as the treatment given this evidence by the Commission. Furthermore, with respect to discriminatory sales to Armour, we are not convinced that competitive history subsequent to the date on which the discriminatory price is announced is a persuasive index of petitioner's good faith on the date of the announcement, especially when a number of factors arguably contributing to that history are largely neglected, and no attempt is made to trace the history of the precise product to which the discriminatory price actually applied.

Nevertheless, we conclude that the petitioner did not present evidence upon which the *Staley* test, as applied in the *Staley* case,[4] dictates a finding of good faith. In particular, petitioner's argument about the $6.90 price, which the Commission charges it should not have returned to, fails to give due weight to the petitioner's previous influence on the market price, and to the fact that when this price was originally established, as well as when it was returned to, it was below petitioner's cost.

We turn to a point raised for the first time by motion presented at the oral argument, namely, that the original

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[4] *FTC* v. *A. E. Staley Mfg. Co.*, 1945, 324 U.S. 746. We do not discuss the law and background facts further, as they will be found in our earlier opinion, to which this is but a supplement.

findings of the Commission were invalid because made by only two of a panel of three members, which was less than a majority of the full Commission. For the impropriety 1966, F.2d . Even if that case be correctly decided, it does not cover the present one. The present order is from a decision of the full, five member, Commission, one member dissenting with respect to the form of the order, only. Petitioner's objection must be limited to the prior decision. That decision remains only to the extent that, on remand, the full Commission accepted the findings previously arrived at as to the so-called other charges. The lack-of-majority vice, if it be a vice, affected the other charges when they came before us on the prior review. Then was manifestly the time to object. Not only did petitioner not raise the objection, but it candidly, and commendably, admits that it failed to do so not because of ignorance, but because, until it had a decision in its favor elsewhere, it did not think the point worth raising.

If petitioner had advanced this matter before, and we had accepted it, the full Commission on rehearing could have reviewed all of the factual questions as to the other charges as well. To let the Commission go ahead on the basis that these findings were valid, and then raise the point by motion to amend the petition for review at the time of argument, is the stuff that waiver and estoppel is made of. Even if petitioner's present point would normally be jurisdictional, it is not in this case. The full Commission has now spoken. The most that petitioner can say is that in entering its second order the full Commission relied, in part, on prior improper findings of fact. Petitioner knew the Commission would, or was at least likely to, rely on those findings. It is now too late to object, in just the same way it would be too late if a party were to claim for the first time before us that a district court had accepted objectionable testimony. The findings were relevant. The time for asserting their incompetency is past.

Finally, as to the form of the order, we quite agree with petitioner that this order leaves something to be desired. The difficulty, however, as was considered at length in argu-

ment at the prior hearing, is that in this field no order can be perfect. This cannot mean that no order can be entered. As Commissioner Elman observed, "Having violated the law, a respondent must expect fencing in by the Commission." With respect to the application of the order in some of the areas which petitioner points out would be totally foreign to the type of conduct considered in this case, the Commission quotes in its brief from *Heavenly Creations, Inc.* v. *FTC*, 2 Cir., 1964, 339 F. 2d 7, 9-10, *cert. den.* 380 U.S. 955, that there should be no genuine fear that "the Commission will behave in . . . literalistic and arbitrary fashion." We will assume that the Commission will respect the principle it so quotes.

The petition will be dismissed.

APPENDIX B

Federal Trade Commission Act
15 U.S.C. § 41

Federal Trade Commission established; membership; vacancies; seal

A commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from September 26, 1914, the terms of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed: *Provided, however*, That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified. The President shall choose a chairman from the commission's membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commission shall have an official seal, which shall be judicially noticed.

Administrative Procedure Act
5 U.S.C. § 1007(b)

Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable oppor-

tunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

15 U.S.C. § 13(a), (b)

Discrimination in price, services, or facilities—Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation

and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 711

FORSTER MFG. CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

In 1963, the Federal Trade Commission issued a cease-and-desist order against petitioners, the Forster Mfg. Co., Inc., and its president, upon finding that they had violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)) (R. 391)[1] by discriminating in price among purchasers of the firm's woodware products. The case was decided by a panel of three commissioners, one of whom dissented. The panel acted under a Commission rule providing that "a majority of the

[1] R. — refers to the Record Appendix to the Brief for the Petitioners in the court below.

members of the Commission constitutes a quorum for the transaction of business." (16 C.F.R. (Cum. Supp. Jan. 1, 1966) 1.7; see Annual Report of the Federal Trade Commission 1916, p. 49.)

Petitioners challenged the order in the Court of Appeals for the First Circuit on various grounds, but they did not question the authority of the two commissioners to enter a valid order. The court of appeals set aside the order, holding that the agency had applied an erroneous standard in rejecting the respondents' defense that the price discriminations had been given to meet competition; and remanded the case to the Commission (R. 469). *Forster Mfg. Co.* v. *Federal Trade Commission*, 335 F. 2d 47, certiorari denied, 380 U.S. 906. After further proceedings the Commission—all five members participating and one commissioner not concurring (not the commissioner who had dissented originally)—again ruled against petitioners (R. 495–530), and entered a modified cease-and-desist order (R. 531–532). Petitioners again sought review in the First Circuit. In this second review proceeding, they urged for the first time on oral argument that the original three-member panel had no authority to enter the original order because only two members had concurred therein. The court of appeals rejected the argument without considering its merits, on the ground that petitioners should have raised the point on their prior appeal; overruled petitioners' other challenges to the order; and dismissed the petition to review (Pet. App. 10–14, 361 F. 2d 340).

The sole question presented is whether the second order is invalid because the full Commission relied upon findings made by the two-commissioner majority in the earlier proceeding. There admittedly is a conflict among the circuits on the question whether such a majority may enter a valid order. The Commission has sought review on the question in *Federal Trade Commission* v. *Flotill Products, Inc.*, No. 668, this Term, and has not opposed review on the question in *Purolator Products, Inc.* v. *Federal Trade Commission*, No. 61, this Term, both pending on petitions for writ of certiorari. In the *Purolator* case in which, unlike *Flotill*, the point was not raised in the court of appeals, the Commission suggested that "it would [nevertheless] appear appropriate for the Court to consider" it, since it "may involve the jurisdiction of the Commission" (Supplemental Memorandum for the Federal Trade Commission, No. 61, this Term, p. 2).

In the present case the issue arises in a significantly different context. The case is like *Purolator* in that the petitioners here also failed to raise the point before the court of appeals on direct review of the order entered by the three-member panel. Unlike *Purolator*, however, where the court of appeals affirmed the two-member order, here the court of appeals reversed that order and remanded the case to the agency for further proceedings, and on such remand the full Commission reconsidered the case. Thus, the failure of petitioners to raise the point on the first appeal denied the Commission the opportunity it otherwise would have had to cure any defect by

reconsidering on remand those aspects of its decision that the court of appeals had not disturbed.

Thus, even though the question of the authority of two members of a three-member panel to enter a valid order may involve the jurisdiction of the agency, sound principles of judicial administration support the ruling of the court of appeals that, in the particular circumstances of this case, the respondents' failure timely to raise the point made it inappropriate for the court to consider it when raised for the first time on the second appeal. Cf. *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 36. Moreover, although the full Commission apparently treated the first opinion of the court of appeals as not requiring it to reconsider anything other than the issue upon which the remand was directed (R. 496), the full Commission did participate in the entry of the new and superseding order which petitioners here challenge.

In the circumstances, we believe that there is no occasion for the Court to review this case together with *Flotill* and *Purolator* and we therefore respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

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OCTOBER TERM, 1966

FORSTER MFG. CO., INC., *a Corporation,*

and

THEODORE R. HODGKINS, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY TO MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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Petitioner's Response To Opposition

Admitting, as it must, that the findings which are the basis of its order were made by 2 of its 5 commissioners, the Federal Trade Commission seeks to avoid review of this jurisdictional defect by claiming Petitioner waived its right to raise lack of jurisdiction by "failure timely to raise the point." (Opposition p. 4)

The Commission's reliance upon *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 is misplaced. For there this Court held that an irregularity in an examiner's appointment "is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity."

The Court in so ruling did not hold that a challenge to jurisdiction is only appropriate if made before the Inter-

state Commerce Commission before appeal to the Courts. See *Manual Enterprise* v. *Day*, 370 U.S. 478, 499, N.5.

This Court stated the principle applicable here in *United States* v. *Corrick*, 298 U.S. 435, 440:

> "The appellants *did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties,* and the district court should, therefore, have declined *sua sponte*, to proceed in the cause. And if the record discloses that the lower court was without jurisdiction, this Court will notice the defect, although the parties make no contention concerning it. While the District Court lacked jurisdiction we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." (Emphasis added)

Attempted action by the Federal Trade Commission outside of its statutory enabling power is void for lack of jurisdiction and such action must be set aside when raised in any court at any time. Cf. *Whitney Nat. Bank* v. *Bank of New Orleans*, 379 U.S. 411, 414.

A fundamental distinction is crystal clear between the failure of the Commission to muster at least the vote of three of its five members as required by its enabling legislation and due process as opposed to a mere irregularity in the appointment of a hearing examiner. The Cease and Desist Order entered by the Commission in this case was beyond its jurisdiction when made by the Commission and the Commission's order must be set aside as void.

An administrative agency of government, such as the Federal Trade Commission, has only such power as is pro-

vided by statute. *F.T.C.* v. *Sinclair Refining Co.*, 261 U.S. 463, 475.

Congress delegated power to a Five Member Federal Trade Commission who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. Federal Trade Commission Act. 15 U.S.C. §41.

The Court of Appeals For the Ninth Circuit has said that "* * * an order of the Commission must be supported by three members in order to constitute an enforceable order of the FTC. Two of five is too few." *Flotill Products, Inc.* v. *F.T.C.*, 358 F. 2d 224, 230 (9th Cir. 1966), affirmed, *per curiam, en banc* August 15, 1966, 1966 Trade Cases §71.871, Petition for Cert. pending, No. 668, This Term. That Court added that it was "* * * difficult to believe that Congress conceived of the five-member FTC with its politically balanced make-up permitting two of its members to speak for the Commission, and failed to specifically provide enabling legislation." .Id. at 229, as amended.

The Federal Trade Commission admits that the question presented in this case i.e. whether an opinion and findings by two of five FTC Commissioners constitutes a decision of the Commission, "may involve the jurisdiction of the agency." (Opposition p. 4)

Indeed the Commission itself is now seeking review of the identical jurisdictional question Petitioner's raise in *Federal Trade Commission* v. *Flotill Products, Inc.*, No. 668, This Term, and has not opposed review of the question in *Purolator Products Inc.* v. *Federal Trade Commission*, No. 61 This Term, review of which is also pending.

Conclusion

It is respectfully submitted that the Commission is wrong as a matter of law in its contention that Petitioner did waive, or could waive, the Commission's lack of jurisdiction by "failure timely to raise the point" and that this Court should review and reverse the void order of the Commission herein.

Respectfully submitted,

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